PRIVY COUNCIL REPORT

PHILIP HOALIM JR. & ANOR v. THE STATE COMMISSIONER, PENANG.

[Privy Council (Lord Wilberforce, Lord Morris of Borth-y-Gest, Lord Kilbrandon, Lord Salmon and Lord Russell of Killowen) October 5, 1976]

[Privy Council Appeal No. 21 of 1975]

Land Law — Lands in Penang originally granted by East India Company on behalf of British Crown — Replacement titles issued — Whether such land alienated land — Legislation imposing rent or providing for increase of rent — Whether legislation contrary to Federal Constitution — National Land Code, 1965, ss. 5, 101(1) and 102(1) — National Land Code (Penang and Malacca Titles) Act, 1963 — Federal Constitution, Articles 4(3) and 13

Privy Council — Appeal to Privy Council — Whether new point of law can be raised on appeal — No pronouncement in the matter by Federal Court.

This was an appeal from the decision of the Federal Court (reported in [1974] 2 M.L.J. 100). The appellant had sought a declaration in the High Court that the National Land Code (Penang and Malacca) Order, 1965 and the State Orders imposing or revising rent on certain lands were null, void and of no effect and contrary to the Constitution. Ong Hock Sim J. (as he then was) stated a case for the opinion of the Federal Court and the Federal Court answered the questions put in the case and ordered that the motion for the declaration be dismissed. In effect the Federal Court held that it was competent for the State authority in Penang to issue the orders under the National Land Code, 1965, in order to impose or increase rents. The appellants appealed and at the hearing before the Privy Council it was sought to argue that the orders of the State Authority operated a compulsory acquisition of property without compensation in breach of Article 13(2) of the Constitution.

Held, dismissing the appeal: (1) the ground of invalidity sought to be maintained against the Federal legislation that is, that it is unconstitutional under Article 13(2) of the Federal Constitution, found no place in the declaration forming the subject-matter of the proceedings and the question was raised in no other declaration. In the circumstances that question could not as a matter of law competently be argued for the first time before the Privy Council;

(2) the appellant's holding must by virtue of paragraph 2(a) of the National Land Code (Penang and Malacca) Order 1965, be deemed to be land alienated before the commencement of the Code and so the Federal Court was right in holding that the State Authority was competent to enact laws to impose or increase rent on such holding.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

John Vinelott Q.C. (*Donald Ratee* with him) for the appellants.

A.J. Balcombe Q.C. (*N. Hague* and *Mohamed Noor bin Haji Ahmad* with him) for the respondents.

Lord Kilbrandon (delivering the judgment of the Board): In 1858 the East India Company granted to the predecessor in title of the appellants by Indenture a holding of land in Penang in what it is agreed shall be regarded as fee simple, notwithstanding that there was no direct limitation to the grantee's heirs. The question in this appeal is whether the State Authority of the State of Penang have, as they have by legislation purported to do, validly subjected the holding to a payment of quit rent at the rate prescribed.

The Federation of Malaya, founded in 1948, consisted of Penang and Malacca, which became British colonies by cession in 1786 and 1824 respectively, and a number of separate protectorates. In the old colonies the title to land stemmed from Crown grants, in the protectorates, naturally, otherwise. It became Federal policy to assimilate the modes of land-tenures throughout the Federation in a system of registered titles, essentially a Torrens system, and on the formation of the federation of Malaysia in 1963, by the incorporation of Singapore, Sarawak and Sabah (North Borneo), the necessary legislation to that end was put in hand. By Article 74 and the Lists set out in the 9th Schedule to the Federal Constitution the respective legislative functions of the Federal Parliament and the States Legislatures are defined. The States List includes land tenure; by Article 76(1), however, Parliament is to a limited extent empowered to legislate in matters enumerated in the State List, including the power to make laws "for the purpose of promoting uniformity of the laws of two or more States." The procedure which was followed can be traced, without going into unnecessary detail, in the preamble to Act 56 of 1965, the National Land Code, which opened as follows:

"Whereas it is desired to introduce in the form of a National Land Code a uniform land system within the States of Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu:

And whereas provision has been made by the National Land Code (Penang and Malacca Titles) Act, 1963, for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles, for the assimilation of such system to the provisions of the National Land Code, and for matters incidental thereto:

And whereas it is now expedient for the purpose only of ensuring uniformity of law and policy to make a law with respect to land tenure...."

The Land Code, the National Land Code (Penang and Malacca Titles) Act, 1963, which was No. 2 of 1963, and an Act amending the latter, No. 55 of 1965, all came into force more or less simultaneously.

The explanation of the phrase "replacement titles" which occurs in the preamble is to be found in Part IV of Act No. 2 of 1963. By section 36 all pre-existing titles were extinguished and the owners of them were entitled to such replacement title, according to the extent of the pre-existing interest, as the Act provided. By section 40(1) it was declared that where a grant of an estate in fee simple had been made by the East India Company, a free grant (later termed a "grant first grade") should be issued.

By section 5 it is provided that any land in respect of which a registered title for the time being subsists, whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, is to be described as "alienated land". Power is given to the State Authority by sections 101 and 102 to fix rents in respect of lands alienated before the commencement of the Act and to revise periodically rents payable in respect of alienated land. Thus so far the effect of the assimilation of land tenures would have apparently been to subject old fee simple holdings in Penang, now held under grants first grade, to the power of the States to extract rents in respect of them.

The subsequent stages in the assimilation of land tenures were left to subordinate legislation. By section 439 of Act 56 of 1965 it is provided that —

"with the concurrence of the State Authority, the Yang Dipertuan Agung may by order under this section provide for the application of this Act in the States of Penang and Malacca subject to such modifications as he may consider necessary or desirable."

In pursuance of that power was made the National Land Code (Penang and Malacca) Order, 1965, L.N. 478. By paragraph 2(a) land held under final replacement title, which would include the appellants' holding, was to be deemed to be land alienated before the commencement of the Code. But from the appellants' point of view the vital provision is that by paragraph 9:

"In the State of Penang sections 101 and 102 shall not apply in relation to (a) grants (first grade) under the 1963 Act or final replacement title issued in respect of such grants...."

No rent could therefore be fixed in respect of the appellants' holding. Later, however, the National Land Code (Penang and Malacca) (Amendment) Order, 1969, P.U. (A) 526, amended L.N. 478 by deleting paragraph 9 thereof. It was followed by an Order of the State Authority of Penang, in exercise of the powers conferred by section 102, fixing rents in respect of all lands alienated before the commencement of the National Land Code, and that included the appellants' holding.

In the High Court in Malaya the appellants sought a declaration that the Order L.N. 478/65, but not in terms P.U. (A) 526/69, and the State Orders imposing or revising rent on the holding were null, void and of no effect and contrary to the Constitution. H. S. Ong J. (as he then was) stated a case for the opinion of the Federal Court under section 48(2) of the Courts of Judicature Act, 1964. The Federal Court answered the questions put in the case, and ordered that the motion for the declaration be dismissed. Against that order the appeal is taken.

The course which the appeal took before their Lordships makes it unnecessary to deal with the matters that came before the Federal Court. Ali F.J., in giving the opinion of the court, held that no question had arisen under Article 167(2)(a) of the Constitution. Counsel for the appellants did not challenge that finding. The next matter arose under Article 13, which provides as follows:

"(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."

As regards the argument that the imposition of rent was contrary to Article 13(1), Ali F.J. observed that that article does not restrict legislative powers, but prohibits illegal executive acts of deprivation;

"If the applicants' right is affected by any of the said orders it is because Parliament has provided that it can be so affected."

Counsel for the appellants did not seek to argue to the contrary. Apart from a matter arising out of the meaning of the words "alienated land", which does not affect the disposal of this appeal, but which will be touched on later, that is the whole content of the case as it was heard before the Federal Court.

Before their Lordships Counsel sought to argue, as his written case had predicted, that the repeal of paragraph 9 of L.N. 478/65 by paragraph 2 of P.U. (A) 526/69, without which the orders of the State Authority would have been *ultra vires* as contrary to Federal legislation, operated a compulsory acquisition of property without compensation in breach of Article 13(2). Their Lordships are of opinion that it would not be proper to entertain such an argument. Article 13 appears in Part II of the Constitution, which is headed "Fundamental Liberties". To challenge Federal legislation, upon which the regulation of extensive real property rights is based, on such a ground is a serious step, and is one which their Lordships are not prepared to countenance in the absence of any pronouncement in the matter by the Federal Court, who are the primary guardians of the fundamental liberties guaranteed by the Constitution. Furthermore, their Lordships are in some doubt whether such a challenge can, in the circumstances, be competently made. Article 4(3) of the Constitution provides that —

"The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground...."

The ground of invalidity now sought to be maintained against the Federal legislation, *i.e.* that it is unconstitutional under Article 13(2), found no place in the declaration forming the subject-matter of these proceedings, and the question is raised in no other declaration. It accordingly appears to their Lordships that that question cannot as a matter of law competently be now argued.

The Federal Court decided that the appellants' holding, although not "alienated land" within the meaning of the definition in section 5 of the National Land Code, is nevertheless "land alienated before the commencement of the Code" for the purpose of section 102(1). Their Lorships see a good deal of difficulty in the way of the first of these findings, and the respondent was prepared to challenge it. Their Lordships, however, did not find it necessary to hear argument on the matter, since in any event it seems that the land must, in virtue of paragraph 2(a) of L.N. 478, be deemed to be so alienated.

Their Lordships will advise the Yang Dipertuan Agung that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors: *Kingsford Dorman & Co.; Stephenson Harwood & Tatham.*